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AGRICULTURAL MARKETING AGREEMENT AND ORDER PROGRAMS, 1933-1944*

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I. Introduction

Experience in the present war has emphasized the importance to our economy of successful distribution of food.1/ For some time, it has been

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1/ The importance of successful food distribution in the war has been recognized by all members of the United Nations. The President of the United States and the Prime Minister of Great Britain created a Combined Food Board in June 1942 to achieve a division of the food resources of all the member nations. At the present time, members of this Board are the United States, Great Britain, and Canada. Its overall function is to consider the supply of and requirements for each commodity and recommend the best division possible in the light of all the circumstances. Recommendations of the Board are concurred in by the member governments.

In this country, the President, on December 5, 1942, signed Exec. Order 9280, 7 Fed. Reg. 10179, vesting in the Secretary of Agriculture "full responsibility for and control over the Nation's food program." Subsequently, by Exec. Order 9322, 8 Fed. Reg. 3807 (1943), as amended by Exec. Order 9334, 8 Fed. Reg. 5423 (1943), the responsibilities of the Secretary of Agriculture, in connection with the Nation's food program, were transferred to the War Food Administrator. Under these Executive Orders, broad grants of authority are made to the War Food

Administrator with respect to assigning priorities and making allocations of food. Moreover, certain powers are delegated with respect to non-food materials and facilities necessary in carrying out the food program. Power is also given the War Food Administrator to make allocations for civilian rationing at the consumer level through the Office of Price Administration.

During these war years, demands for American food are unparalleled in our history. It has been necessary to supply nutritious and morale sustaining food to our farflung armed forces, as well as to our civilians who, with an increased purchasing power, are demanding more food than ever before. In addition, we are distributing food to our fighting Allies. Food has been a weapon of victory, and the machinery, both on the national and international scale, set up to achieve its successful production and distribution, has been a vital part of the over-all war machine. ". . . in a war on so vast a scale as the present conflict, with a large and increasing proportion of our civilian population directly employed in the production of weapons for the armed forces, adequate food supplies for the civilian population are essential to the successful prosecution of the war." United States v. Beit Bros., 50 F. Supp. 590, 593 (D. Conn. 1943).

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apparent that serious dislocations in the marketing of farm commodities and products can disrupt the whole system of producing, distributing, and consuming food.2/ When this happens, the health and morale of the people are endangered.

2/ The Supreme Court, in Nebbia v. New York, 291 U. S. 502 (1934), in speaking of the "economic maladjustment" in the New York milk shed prior to the enactment of State and Federal legislation of the type under consideration, said there was a maladjustment of prices which "threatens harm to the producer at one end of the series and the consumer at the other." The Court graphically described the situation as follows: "During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve." Id. at 515.

It has been demonstrated, by experience, that one factor which has been responsible for disturbances in the successful marketing of food arises from inadequate prices received by producers for their efforts. There was a tendency, following World War I, for the price structure of American agriculture, in relation to industrial prices, to deteriorate. Awareness of the state of unbalance occasioned by this price disparity, resulting in a fundamental dislocation in the American economic system, and realization of the need for correcting this state of agricultural-industrial disparity, has, in the past decade, prompted the passage by the Congress of several important action programs of agricultural amelioration.3/

3/ Congressional awareness of the disparity between agricultural and industrial prices is shown in the "Declaration of Emergency" contained in § 1 of the Agricultural Adjustment Act of 1933, Act of May 12, 1933,

48 Stat. 31, which was as follows: "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

More recently, laws dealing with price support operations have been enacted to assure the farmer an adequate return for his labor and, particularly during the war years, to assure an all-out production of necessary crops. Laws dealing directly with these price support operations are the basic commodity loan legislation found in § 302 of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U.S.C. § 1302 (1940); § 8 of the Stabilization Act of 1942, 56 Stat. 767, 50 U.S.C. App. § 968 (Supp. 1943), as amended by the Stabilization Extension Act of 1944, Pub. L. No. 383, 78th Cong., 2d Sess. (June 30, 1944) § 204; and the so-called Steagall Amendment, 55 Stat. 498 (1941), as amended by 56 Stat. 768 (1942), 15 U.S.C. § 713a-8 (Supp. 1943), the latter dealing with the non-basic commodities. A principal aim of both the Steagall Amendment and the basic commodity loan provisions of the Stabilization Act is to give assurance to producers that they will receive a fair return for their production of commodities required during the war period and, thus, to encourage the necessary production of such commodities.

The marketing agreement and order provisions of the Agricultural Adjustment Act of 1933, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937,4/ the subject of this

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4/ References in this article to the "Act" or the "statute", unless otherwise specified, are to sections of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended, 49 Stat. 750 (1935), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq. (1940).

In Elm Spring Farm, Inc., et al. v. United States, 127 F. (2d) 920, 927 (C. C. A. 1st, 1942), the Circuit Court of Appeals for the First Circuit stated: "The Act and the Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. . . ."

In Queensboro Farms, Inc. v. Wickard, 137 F. (2d) 969, 974 (C. C. A. 2d, 1943), Judge Frank stated that: "The act was originally enacted in 1933 and was amended in 1935 and again in 1937, 7 U. S. C. A. § 601 et seq. . . . Experience before and since the passage of that legislation has disclosed that the 'milk problem' is exquisitely complicated. The city-dweller or poet who regards the cow as a symbol of bucolic serenity is indeed naive. From the udders of that placid animal flows a bland liquid indispensable to human health but often provoking as much human strife and nastiness as strong alcoholic beverages. The milking of animals in order to make use of their lactic secretions for human

food was one of the greatest human inventions, but the domestication of milk has not been accompanied by a successful domestication of some of the meaner human impulses in all those engaged in the milk industry. The difficulties described as 'the milk problem' revolve in some considerable measure about the complex relations between the farmers and the 'handlers' who buy milk from the farmers and sell it, in fluid or altered form, directly or indirectly through others, to the ultimate consumer."

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article, are measures designed to correct the disparity between agricultural-industrial price relationships. Since the passage of this legislation, it has been of tremendous importance in the peace-time economy of this country; and, with the entrance of the United States into the current conflict, programs under the statute have been important in the Nation's war food program.

II. The History of the Act

The genesis of this statute is found in the Agricultural Adjustment Act of 1933.5/ Much of this latter act, particularly those provisions

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5/ Act of May 12, 1933, 48 Stat. 31.

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dealing with (1) acreage adjustment, (2) commodity loans, and (3) surplus removal operations, conplemented by the so-called processing tax, dealt with specified basic agricultural commodities.6/ However, two

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6/ The basic agricultural commodities, as specified by the 1933 Act, 48 Stat. 38, were wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products. These are not to be confused with the present basic commodities which are corn, wheat, cotton, tobacco, rice, and peanuts for nuts.

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parts of the 1933 statute dealt with all farm commodities and products. Section 8(2) authorized the Secretary of Agriculture7/ to enter into

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7/ As indicated in note 1 supra, responsibilities of the Secretary of Agriculture under the statute are now vested in the War Food Administrator, and in this article, unless otherwise specified, the various sections of the statute will be mentioned in relation to the War Food Administrator rather than to the Secretary of Agriculture.

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marketing agreements with persons engaged in the handling, in the current of interstate commerce, of any agricultural commodity; and Section 8(3) authorized the Secretary of Agriculture to issue licenses regulating the handling of such commodities. Since the marketing agreement and licensing provisions of the statute applied to all farm products, they could be used as a supplement to, or in lieu of, production control measures for basic commodities and also as the sole method of attack on the problem of non-basic farm commodities.

In 19348/ and 19359/, enforcement provisions to the 1933 Act were

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8/ Act of May 9, 1934, 48 Stat. 674, 675, 7 U.S.C. § 608a (4)-(9)(1940).
9/ Act of August 24, 1935, 49 Stat. 762, 7 U.S.C. § 608a(7) (1940).

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passed. The 1935 Act also amended the licensing provision by eliminating the word "license" and substituting therefor the word "order".[10]

10/ See H. R. Rep. No. 1241, 74th Cong., 1st Sess. (1935) 7-8.

The 1935 Act also limited the applicability of the orders which it authorized to designated agricultural commodities.[11]

11/ By the 1935 amendment to the Act, the applicability of orders was limited to milk, fruits (including pecans and walnuts but not including apples, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, and naval stores as included in the Naval Stores Act, 42 Stat. 1435 (1923), 7 U.S.C. § 91 et seq. (1940), and standards established thereunder (including refined or partially refined oleoresin). The 1935 amendment also provided that orders might apply to products of certain of the designated commodities. 49 Stat. 754, 7 U.S.C. § 608c (2) (1940).

The decision of the Supreme Court of the United States in United States v. Butler,[12] decided January 6, 1936, invalidated the acreage

12/ 297 U. S. 1 (1936).

adjustment and processing tax provisions of the Agricultural Adjustment Act. However, the decision did not deal with the other provisions of the Act, including the marketing agreement and order features. Following this decision, opinions of several United States District Courts differed as to whether the whole Act fell with the unlawful provisions.[13]

13/ Compare United States v. David Buttrick Co., 15 F. Supp. 655 (D. Mass. 1936), and Ganley v. Wallace, 17 F. Supp. 115 (D.C. 1936), with Edwards v. United States, 14 F. Supp. 384 (temporary injunction); 16 F. Supp. 53 (permanent injunction) (S. D. Calif. 1936).

To clear up the doubt which existed, Congress passed the Agricultural Marketing Agreement Act of 1937,[14] consisting, mainly, of

14/ Act of June 3, 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq. (1940). As stated in note 4 supra, all references in this article to the "Act" or to the "statute", unless otherwise indicated, are to this statute. See Sellers, Administrative Procedure and Practice in the Department of Agriculture Under the Agricultural Marketing Agreement Act of 1937 (1939), a mimeographed monograph, for a more detailed discussion of the Act.

Literature in legal periodicals with respect to this Act is scanty, especially since 1937. Following is a list of articles which have appeared from time to time since 1933 (many of the questions raised in these articles have been subsequently adjudicated by courts): Howard, The Supreme Court, the Constitution and the A.A.A. (1937) 25 Ky. L. J. 291; Duane, Marketing Agreements Under the Agricultural Adjustment Act: Their Contents and Constitutionality (1933) 82 U. of Pa. L. Rev. 91; (1935) 33 Mich. L. Rev. 952; Black, At What Stage May a Licensee Seek Equitable Relief Under the Agricultural Adjustment Act?

(1935) 12 N.Y.U.L.Q. Rev. 354; (1934) 83 U. of Pa. L. Rev. 86; (1935) 9 Temp. L. Q. 95; Black, Does Due Process of Law Require an Advance Notice and Hearing Before a License is Issued Under the Agricultural Adjustment Act? (1935) 2 U. of Chi. L. Rev. 270; Black, May Price Fixing and Proration Devices Be Utilized by the Secretary of Agriculture Appurtenant to the Exercise of the License Power Under the Agricultural Adjustment Act? (1935) 23 Georgetown L. J. 196; Comment, Agricultural Adjustment and Marketing Control (1936) 46 Yale L. J. 130; Comment, Agricultural Marketing Agreement Act--Milk Regulation (1939) 17 N. Y. U. L. Q. Rev. 86; Case Note, Anti-Trust Prosecutions and the Agricultural Marketing Act (1939) 34 Ill. L. Rev. 345; Case Note, The Walnut Crop Control Pool of the A.A.A. (1939) 33 Ill. L. Rev. 595. See also, Nourse, Marketing Agreements under the A.A.A. (1935), and Nourse, Davis, and Black, Three Years of the Agricultural Adjustment Administration (1937).

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certain provisions which appeared in the amended 1933 Act. The 1937 Act does, however, contain new legislation with respect to the arbitration and mediation of milk disputes,15/ and makes certain other important amendments to the statute.

15/ Section 3 of the Act, 7 U. S. C. § 671 (1940).

III. Policy and General Provisions of the Act

The declared policy of the 1937 Act is to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will provide farmers currently with a purchasing power equivalent to that which they enjoyed during a designated base period in the past, and to protect the interest of the consumer in approaching and maintaining this level of prices.16/ To effectuate

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16/ "It is hereby declared to be the policy of Congress--

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing

no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section." 7 U. S. C. § 602 (1940).

Marketing agreement and order programs may only be undertaken with respect to such handling of a commodity, or product thereof, as is in the current of interstate or foreign commerce or which directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof. Sections 8b and 8c(1) of the Act, 7 U. S. C. § § 608b, 608c(1) (1940). For a definition of the term "interstate or foreign commerce", as used in the Act, see § 10(j) of the Act, 7 U. S. C. § 610(j) (1940). See also, United States v. Wrightwood Dairy Company, 315 U. S. 110 (1942).

No action, with respect to a marketing agreement or order program, is authorized by the Act, which has for its purpose the maintenance of prices above the level which it is declared to be the policy of the Congress to establish. Sections 2(1) and (2), 8e, and 8c(18) of the Act, 7 U. S. C. § § 602, 608e, 608c(18) (1940).

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this policy, the Secretary of Agriculture is authorized to determine whether such a purchasing power is being realized by farmers.17/ When

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17/ Ibid. Also see, in this connection, § 8e of the Act, relating to the determination of the base period where there are no available statistics in the Department of Agriculture to determine the purchasing power during the base period specified in § 2; and § 8c(18) of the Act, which provides that, whenever the Secretary finds that the prices which will give milk a purchasing power equivalent to its purchasing power during the base period as determined pursuant to §§ 2 and 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. See United States v. Wrightwood Dairy Company, 127 F. (2d) 907 (C. C. A. 7th, 1942), and H. P. Hood & Sons, Inc. v. United States, 307 U. S. 588, 595, 596 (1939), for a discussion of the functions of the Secretary in finding and proclaiming the base periods.

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he finds that their present purchasing power is not equivalent to the statutory standard, the regulatory provisions of the Act are to be effective.18/

18/ Section 8c of the Act, 7 U. S. C. § 608c (1940).

There are several methods which may be used, under different circumstances, to carry out the declared policy of the Act:19/

19/ See United States v. Borden Company, 308 U. S. 188 (1939), for a discussion by the Supreme Court of the ways of effectuating the declared policy of the Act.

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(1) The War Food Administrator20/ may enter into marketing agreements21/

20/ See notes 1 and 7 supra.

21/ Section 8b of the Act, 7 U. S. C. § 608b (1940).

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with persons engaged in handling agricultural commodities or products. A marketing agreement, where employed, makes possible the voluntary achievement of the statutory objectives.[22] Marketing agreements are

[22] Marketing agreements must also be considered in determining the conditions under which marketing orders may be issued pursuant to the Act. Orders may not, under § 8c(8) of the Act, 7 U. S. C. § 608c(8) (1940), become effective until, among other things, a stipulated percentage of handlers (50 per cent, except that with respect to what is known as California citrus fruits it is 80 per cent) have signed a marketing agreement. On the other hand, if this stipulated percentage of handlers fail or refuse to sign a marketing agreement, an order may, nevertheless, be made effective pursuant to § 8c(9) of the Act, 7 U. S. C. § 608c(9) (1940).

entered into, after notice and opportunity for hearing, with processor s, producers, associations of producers and other handlers and may be executed with respect to any agricultural commodity or product thereof, differing in this respect from orders which are applicable only to designated commodities.[23]

[23] Section 8c(2) of the Act specifies the commodities to which orders may now be made applicable. They are milk, fruits (including pecans and walnuts but not including apples, other than apples produced in Washington, Oregon and Idaho, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops (until September 1, 1945), honey-bees, and naval stores as included in the Naval Stores Act, 42 Stat. 1435 (1923), 7 U. S. C. § 91 et seq. (1940), and standards established thereunder (including refined or partially refined oleoresin). The Act also authorizes the issuance of orders with respect to products of certain of the designated commodities. Sections 8c(2), 8c(6), and 8c(11) of the Act, 7 U. S. C. §§ 608c(2), 608c(6), 608c(11), (1940).

(2) On the other hand, mandatory orders applicable to specified commodities or their products may be issued.[24] Under the Act, orders

[24] Section 8c(1) of the Act, 7 U. S. C. § 608c(1) (1940).

may be promulgated only after notice is given and opportunity for hearing is afforded,[25] and stipulated findings are made.[26] Orders may be made

[25] Section 8c(3) of the Act, 7 U. S. C. § 608c(3) (1940).

[26] Section 8c(4) of the Act, 7 U. S. C. § 608c(4) (1940).

effective notwithstanding the failure or refusal of a stipulated percentage of handlers to sign a marketing agreement containing provisions similar to the order.[27]

[27] See note 22 supra.

(3) Finally, under the Act, the War Food Administrator may act as mediator or arbitrator[28] in disputes between milk cooperative associations and purchasers, distributors, handlers or processors respecting the terms and conditions of sales of milk or its products.

The Act provides for both quasi-legislative and quasi-judicial proceedings.[29] The former is that which, under the Act, must occur before

28/ Section 3 of the Act, 7 U. S. C. § 671 (1940). Marketing agreements and marketing orders are the main regulatory devices authorized by the statute. The mediation and arbitration procedure has not been used to any great extent. There is also another regulatory feature of the Act which may be mentioned, namely, the establishment by the President of import quotas when there is reason to believe that programs under the Act will be impaired by imports. Sellers, op. cit. supra note 14, at 6.

29/ Only those hearings relating to the issuance of marketing orders under § 8c of the Act, 7 U. S. C. § 608c (1940), (and, to some extent, of marketing agreements under § 8b of the Act, 7 U. S. C. § 608b (1940)) and those relating to rulings made pursuant to § 8c(15)(A) of the Act, 7 U. S. C. § 608c (15)(A)(1940), are discussed in the text of this article. For a discussion of certain other proceedings for which the Act provides, see Sellers, op. cit. supra note 14, at 8-63. Although the words "quasi-legislative" and "quasi-judicial" are used to describe the two main types of proceedings authorized by the Act, since this is traditionally the terminology used by writers on administrative law, see Federal Security Administrator v. Quaker Oats Company, 318 U. S. 218, 227 (1943), and Opp Cotton Mills v. Administrator, 312 U.S. 126, 156 (1941), for a tendency on the part of the Supreme Court to ignore such distinction, in terminology at least, and to refer to both rule making and adjudicatory proceedings as "quasi-judicial" proceedings.

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the issuance of, and serve as a foundation for, the regulatory order or marketing agreement when executed without an order. It is directed toward no particular individual but toward all persons who might be affected by the issuance of the order; and the result of the proceeding, after notice and hearing, is a regulatory order having the force and effect of law. The United States Circuit Court of Appeals for the Seventh Circuit, in United States v. Wrightwood Dairy Company,30/ discussed

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30/ 127 F. (2d) 907, 910 (C. C. A. 7th, 1942).

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this so-called "promulgation" hearing in the following terms:

> "The realities of the situation are clear. In the case of many proposed agreements, hundreds of people may be present at a hearing and every individual would be equally desirous of insuring the maximum protection to his own interests. If the equivalent of court proceedings were granted to each person, or even to groups, the hearing would be unwieldy and not susceptible to a satisfactory conclusion. Obviously, a more workable balance must be struck between administrative efficiency and the protection of individual rights."

The court further pointed out that the object of the hearing provided for by Section 8c(3) of the Act is not only to afford the individuals the opportunity of airing their objections to the proposed scheme of regulation, but also to give the administrators the chance of obtaining information which might otherwise have been overlooked or not available to them.

In discussing the true nature of the proceeding leading to the issuance of an order, it has been stated:

"However dim the boundaries which segregate the rule-making from the adjudicative functions, 'the hinterland' is clear. Where the proceeding is for the purpose of formulating a rule or standard of general applicability; where, even though individuals or groups of individuals are immediately interested or affected, the action to be taken reaches beyond such individuals and operates more or less directly upon large groups or classes of the public; it is legislative in substance and, normally, in form likewise."31/

31/ Sellers, op. cit. supra note 14, at 27-28.

The enforcement of such quasi-legislative orders is sanctioned by criminal32/ and civil penalties and remedies.33/

32/ Section 8c(14) of the Act, 7 U. S. C. § 608c(14)(1940).

33/ Section 8a (5)-(8) of the Act, 7 U. S. C. § 608a(5)-(8)(1940).

The other principal proceeding for which the Act provides is one which may be instituted by individuals affected by a marketing order.34/

34/ Section 8c(15)(A) of the Act, 7 U. S. C. § 608c(15)(A)(1940).

It can begin only after an order has been issued, and the proceeding is directed toward the effect of such an order upon an individual rather than toward the formulation of a general regulation. This proceeding is quasi-judicial and adversary in character, with the War Food Administrator acting as a judge35/ rather than in an administrative

35/ Pursuant to the so-called Schwellenbach Act, approved April 4, 1940, 54 Stat. 81, 5 U. S. C. §§ 516a-516c (1940), the War Food Administrator has delegated to an Assistant to the War Food Administrator the duty of performing the regulatory functions specified in the Act, which includes performance of the quasi-judicial functions, 8 Fed. Reg. 8087 (1943). The "Agriculture Decisions", published monthly, contains decisions made in proceedings of a quasi-judicial character. See the following decisions by the Assistant to the Secretary of Agriculture and the Assistant to the War Food Administrator discussing the quasi-legislative and quasi-judicial proceedings conducted under the Agricultural Marketing Agreement Act of 1937: In re Breakstone Bros., Inc., 1 A. D. 26 (1942); In re Mutual Orange Distributors, et al., 1 A. D. 207 (1942); In re Wawa Dairy Farms, Inc., 2 A. D. 89 (1943); In re Dairy Specialties, Inc., & Brook Hill Farms, Inc., 3 A. D. 1, 3 A. D. 83 (1944); In re Middletown Milk & Cream Co., Inc., 3 A. D. 84 (1944); In re Grandview Dairy, Inc., 3 A. D. 335 (1944); and In re Bailey Farm Dairy Co., et al, 3 A. D. 715 (1944).

capacity. In the In re Mutual Orange Distributors, et al.,36/ the

36/ 1 A. D. 207, 212 (1942).

Assistant to the Secretary of Agriculture said:

". . . The purpose of the proceeding is to determine whether an order is 'in accordance with law'; not in the abstract, but with respect to a particular handler and his actual situation under the order."

The proceeding under Section 8c(15)(A) has also been described as follows:

> ". . . Arising out of the complaint or petition of an aggrieved handler, the hearing is held for the purpose of determining the applicability to the petitioner of the challenged order. The proceeding is obviously adversary. The parties are well-defined. The order itself having already been issued, the administrative or quasi-legislative function of the Secretary has been completely exercised before the review proceedings are begun. The proceeding is directed to a determination of the legality of the order. However lacking in finality such a determination may be, it is nevertheless adjudicatory in essence and judicial in scope."37/

37/ Sellers, op. cit. supra note 14, at 42.

If a handler is dissatisfied with the decision of the War Food Administrator in this quasi-judicial proceeding, he may have a review of the ruling by a court.38/

38/ Section 8c(15)(B) of the Act, 7 U. S. C. § 608c(15)(8)(1940). See cases cited infra note 80.

Some provisions of the Act are common to all orders issued under it. For example, each order may provide for the selection of an agency to administer the order, make rules and regulations, investigate and report violations, and recommend amendments.39/ Aside from these common

39/ For a discussion by the Assistant to the War Food Administrator of the duties of the agency selected to administer an order pursuant to § 8c(7)(C) of the Act, 7 U. S. C. § 608c(7)(c)(1940), see In re Grandview Dairy, Inc., 3 A. D. 335 (1944). See also United States v. Levine, 129 F. (2d) 745 (C. C. A. 2d, 1942); In re Shawsheen Dairy, Inc., 47 F. Supp. 494 (D. Mass. 1942); Beranek v. Wallace, 25 F. Supp. 841 (N. D. Ind. 1939), regarding the functions and duties of the agency selected to administer an order.

provisions, the statute differentiates between orders relating to milk and its products and orders relating to other specified agricultural commodities and products thereof.

IV. Milk Marketing Programs

Milk orders may contain provisions classifying milk according to its use, providing for prices for each use classification, and fixing minimum prices to be paid by handlers to producers.40/ The Act authorizes

40/ Section 8c(5)(A)-(B) of the Act, 7 U. S. C. § 608c(5)(A)-(B) (1940).

the establishment of a so-called "equalization pool",41/ the purpose of

41/ Section 8c(5)(C) of the Act, 7 U. S. C. § 608c(5)(C)(1940).

which is to equalize throughout the market the burden of carrying surplus milk. Producers may be paid on the basis of an "individual handler" or a "market-wide" pool plan, in either case with or without a base rating system.42/ Under stated conditions, prices to be paid by handlers

42/ Gaumnitz and Reed, Some Problems Involved in Establishing Milk Prices (U. S. Govt. Printing Office, Washington: 1937), Chapter 2, discusses the development of the classified price plan of selling milk to distributors and the various methods of prorating among producers the proceeds of sales to distributors.

to producers may be fixed without regard to the base period designated by the Act.43/

43/ Section 8c(18) of the Act, 7 U. S. C. § 608c(18)(1940).

While the milk marketing orders are not, in all respects, identical--since each is designed to meet the needs of a particular area--consideration of one of the most prominent milk orders will illustrate some of the regulatory features of the Act. On August 5, 1938, Order 27, regulating the handling of milk in the New York Metropolitan Marketing Area, was issued by the Secretary of Agriculture. The order became effective September 1, 1938. It has subsequently been amended from time to time.44/

44/ Originally effective September 1, 1938, 3 Fed. Reg. 1945, 1957, 2100, 2102, the order was suspended January 31-July 1, 1939, 4 Fed. Reg. 1259, 2377, was reissued with amendments March 30, 1940, 5 Fed. Reg. 1258, 1585, was again amended December 9, 1940, 5 Fed. Reg. 4970, February 21, 1941, 6 Fed. Reg. 1181, June 14, 1941, 6 Fed. Reg. 2944, 3160, and August 29, 1941, 6 Fed. Reg. 4507, 4964, and was reissued with amendments March 26, 1942, 7 Fed. Reg. 2370. See 7 C. F. R. (Supp. 1938) §§ 927.1-927.11a, with Cum. Supp. yearly since that date.

This order is based, as required by Section 8c(4) of the Act, upon evidence introduced at a public hearing held pursuant to Sections 8b and 8c(3) of the Act.45/

45/ The Supreme Court, in United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 576 (1939), described the public hearings preceding the original issuance of the order regulating the handling of milk in New York as follows: ". . . Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary, in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment. Numerous parties again filed briefs. . . ." All together, including the original hearing on the New York order, which lasted from May 16 to June 7, 1938, and including a pending hearing on proposed amendments to the order, there have been 11 hearings in connection with the regulations in the New York milk marketing area. These hearings have covered 69 full days. A total of 16,388 pages of evidence and 656 exhibits has been received at these hearings.

After the first public hearing was held, a tentative marketing agreement was submitted to the handlers of milk in the marketing area for their signature. Upon the refusal and failure of handlers of more than 50 per cent of the volume of milk produced or marketed within the area to sign the marketing agreement, the order was made effective, pursuant to Section 8c(9) of the Act, upon the determination of the Secretary of Agriculture, with the approval of the President, that the refusal and failure of the handlers to sign the marketing agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the order was the only practical means of advancing the interests of the producers of milk for sale in the marketing area; and that the order met with the approval of more than two-thirds of such producers.

The main regulatory provisions of the New York Order are those made pursuant to Sections 8c(5)(A), (B)(ii), and (C) of the Act. These provisions fix the value of milk according to its use by each handler, establish a minimum uniform price for milk to be paid by all handlers to all producers, and establish a producer-settlement fund in the hands of the market administrator through which each handler, by making payments to the fund or withdrawing payments therefrom, in addition to payments made by him directly to producers, pays out the total value of the milk according to the use made of it by each handler.

The total use value of milk to a handler for each delivery period is, under this order, ascertained by multiplying the quantity of milk used during such period by the handler in each of the classifications by the applicable minimum price for that class and adding together the totals. The value of milk to a handler subject to the order, however, is not necessarily the same as the price paid to his producers. The minimum price which handlers must pay to producers for each delivery period is called the "uniform price" or the "blended price". It is ascertained by dividing the total use value of all milk received from producers by all handlers subject to the order, during a delivery period, by the total quantity of such milk. Payment of the uniform price to all producers supplying the milk is effected through the producer-settlement fund maintained by the market administrator selected to administer the order. Each handler whose total use value of milk for a particular delivery period is greater than his total payments to producers at the "uniform price" is required to pay such difference into the producer-settlement fund. Each handler whose total use value of milk is less than his total payments to producers at the "uniform price" is entitled to withdraw the amount of such difference from the producer-settlement fund. The operation of this equalization plan[46/] may be illustrated by the following example in which A, B, and C are taken as the only handlers in a marketing area:

46/ See United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 571 (1939), and Elm Spring Farm, Inc., et al. v. United States, 127 F (2d) 920, 927 (C. C. A. 1st, 1942).

Handler	Class I, fluid milk: Price, $2 cwt. Cwt.	Value	Class II, cream: Price $1.50 cwt. Cwt.	Value	Class III, butter: Price, $1 cwt. Cwt.	Value	Total Cwt.	Total Value
A	500	$1,000	200	$300	300	$300	1,000	$1,600
B	700	1,400	100	150	200	200	1,000	1,750
C	300	600	300	450	400	400	1,000	1,450
Total	1,500	3,000	600	900	900	900	3,000	4,800

$$\text{Uniform Price} = \frac{\$4,800 \text{ (Total value)}}{3,000 \text{ cwt. (Total quantity)}} = \$1.60 \text{ cwt.}$$

PRODUCER-SETTLEMENT FUND
/ADJUSTMENT ACCOUNTS OF HANDLERS/

Handler A Debit	Handler A Credit	Handler B Debit	Handler B Credit	Handler C Debit	Handler C Credit
$1,600[1]	$1,600[2]	$1,750[1]	$1,600[2]	$1,450[1]	$1,600[2]
			150[3]	150[4]	
1,600	1,600	1,750	1,750	1,600	1,600

1/ Value of milk according to use.

2/ Paid to producers at uniform price.

3/ Cash paid to the producer-settlement fund.

4/ Cash withdrawn from the producer-settlement fund.

The order provides for numerous classes of milk, depending on its use, and fixes or prescribes a method for establishing a price for each class.[47]

47/ Queensboro Farm Products, Inc. v. Wickard, 47 F. Supp. 206 (E. D. N. Y. 1942), aff'd, 137 F. (2d) 969 (C. C. A. 2d, 1943); Waddington Milk Company v. Wickard, 140 F. (2d) 97, 99 (C. C. A. 2d, 1944).

It is important to bear in mind that the Act, in its price-fixing and payment features, is simply a refinement of methods already fairly well developed in the dairy industry for distributing returns to producers.[48] Since milk is highly perishable in fluid form, it must be

48/ Gaumnitz and Reed, op. cit. supra note 42, Chapter 2, at 36-40.

marketed immediately. When cities were small, most of the milk used for consumption was distributed by producers to city consumers. As the size of cities increased, it became necessary to go farther to obtain a sufficient supply of milk. Because of the increased distances over which it was necessary to transport milk and the stricter regulations pertaining to its handling, the disadvantages of direct distribution by producers became apparent. Companies were organized for the purpose

of purchasing milk from unorganized producers, processing it, and, finally, distributing it to consumers.49/ In most of the big cities

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49/ "The public hearings held before the issuance of the order disclosed that the production and distribution of milk for the New York milk market constitutes one of the most complex distributing mechanisms in the United States. About sixty thousand producers produce milk which is delivered twice daily to approximately four hundred milk receiving stations. From there, the milk flows in an infinite variety of channels to emerge finally in a vast number of different products, which in turn pass through the hands of numerous operators before finally reaching the ultimate consumer." Abruzzo, J., in Queensboro Farm Products, Inc. v. Wickard, 47 F. Supp. 206, 208 (E. D. N. Y. 1942).

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the greater portion of the milk business is now in the hands of large distributors.

The development of large distributing enterprises created a new relationship between the producer and his market. Producers, unable to maintain direct control over the prices they received for their milk, began to organize cooperatives which enabled them to bargain collectively in the sale of milk to large distributors. By the time of the passage of the Act under consideration, the milk industry had become fairly well organized with respect to market practices and methods of distributing returns among producers.

Usually, the largest volume of milk is produced for sale as fluid milk within the marketing area, and milk sold for this purpose commands the best price. There is always competition for this market. There is also milk of the same quality which cannot be used for fluid purposes. This surplus is utilized in the production of butter, cheese, powdered milk, evaporated milk, condensed milk, and other dairy products.

When this country undertook to ship food, including dairy products, abroad following the outbreak of hostilities in Europe, it became evident that larger quantities of milk, butter, cheese, and other products of milk were needed. Also, with an increased purchasing power, more civilians in this country began to consume more milk and its products. Concurrently, with the rise of this record demand for dairy products, submarine attacks on our shipping lanes by the Enemy made cargo space available for all food items extremely scarce. In order to transport the tonnage needed by our Allies and, eventually, our Army overseas, everything possible had to be done to conserve cargo space. One way in which this was accomplished was by increasing the volume of powdered or dried milk50/ shipped for war purposes. Huge

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50/ The reports issued annually by the Bureau of Agricultural Economics on the production of manufactured dairy products illustrate the sharp increase in the use of powdered milk during the war years. Following is a résumé of the United States production of dry whole milk and of non-fat dry milk solids for human consumption by calendar years from 1935 to the present time:

Years	Dry Whole Milk Thousand pounds	Non-fat Dry Milk Solids Thousand pounds
1935	19,432	187,531[1]
1936	18,180	223,827[1]
1937	13,676	244,511[1]
1938	21,496	289,121
1939	24,472	267,860
1940	29,409	321,843
1941	45,627	366,455
1942	62,167	565,414
1943[2]	137,229	505,394
1944[3]	(172,000)	(567,000)

1/ Packed in barrels.
2/ Preliminary.
3/ An estimate by the Dairy and Poultry Branch, Office of Marketing Service, WFA.

quantities of this particular dairy product have been manufactured for overseas shipment by plants constructed[51] for that purpose.

[51] Twenty-five milk dehydration plants have been constructed to meet the additional powdered milk requirements resulting from acute war needs.

To meet these increased demands for all purposes on the United States supply of milk, it became necessary to allocate the total supply, thereby assuring sufficient dairy products of all kinds to meet all reasonable demands. Accordingly, the War Food Administrator, on September 7, 1943, issued a war food order,[52] which provides for the establishment of milk sales areas, base periods, quotas, and quota periods, and which further provides that no handler may, during any

[52] War Food Order 79, 8 Fed. Reg. 12426 (1943). /This order was formerly known as Food Distribution Order 79, but by an order of the Assistant War Food Administrator, issued April 20, 1944, 9 Fed. Reg. 4319, it was provided that Food Production Orders, Food Distribution Orders, Commodity Credit Orders, and Food Directives should thereafter be known as War Food Orders; and those previously issued were redesignated and numbered accordingly.--Ed. note./

quota period, deliver, within a milk sales area, more milk, milk by-products, or cream than the quantity allowed by his quota for such milk, milk by-products, and cream during any such period. A large number of supplementary orders have been issued prescribing the base periods, quotas, and quota periods for various milk sales areas.[53]

[53] One hundred and forty-four supplementary orders have been issued to effectuate the provisions of War Food Order 79. See, for example, War Food Order 79-1, dealing with the milk sales area of Baltimore, Maryland, 8 Fed. Reg. 13364, issued September 30, 1943.

Under this scheme of regulation, handlers in the various milk sales areas are permitted to deliver milk, milk products, and cream to their customers in an amount equal to designated percentages of such deliveries in June 1943. This program is designed to assure a reasonably adequate supply of dairy products for civilian consumption and, at the same time, to assure a sufficient supply of milk for the milk dehydration plants and other milk product plants to enable them to produce enough dried milk and other dairy products to meet special war needs.

The allocation program prescribed by the War Food Order is not, of course, predicated upon the Agricultural Marketing Agreement Act of 1937, but upon the authority contained in Title III of the Second War Powers Act, 1942,54/ which provides that:

> ". . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." (Section 2(a)(2).)

54/ 56 Stat. 176 (1942), 50 U. S. C. App. § 633 (Supp. 1943).

In connection with the administration of this War Food Order program, the milk supply is constantly under review. During the season of "flush" production last summer, permitted percentages of deliveries of milk and milk products by handlers were increased, and, when the flush production period had passed, were lowered to their former level.

This War Food Order program55/ was one of two alternatives considered

55/ There are a number of War Food Orders issued pursuant to Title III of the Second War Powers Act, 1942, predicated upon a shortage or threatened shortage of milk or its products: War Food Order 2, 8 Fed. Reg. 253 (1943), as amended (requiring butter to be set aside); War Food Order 8, 8 Fed. Reg. 953 (1943), as amended (restrictions on the production of frozen dairy foods and mix); War Food Order 11, 8 Fed. Reg. 1090 (1943), as amended (restrictions on disposal of milk and certain milk products, designed to effect economies in the marketing of milk); War Food Order 13, 8 Fed. Reg. 1479 (1943), as amended (restrictions with respect to cream); War Food Order 15, 8 Fed. Reg. 1704 (1943), as amended (requiring Cheddar Cheese to be set aside); War Food Order 54, 8 Fed. Reg. 7210 (1943), as amended (requiring dried skimmed milk to be set aside); War Food Order 92, 9 Fed. Reg. 1082 (1944) (restrictions on the production of cheese and cheese foods); War Food Order 93, 9 Fed. Reg. 2076 (1944), as amended (restrictions on the production and sale of dried milk); and War Food Order 95, 9 Fed. Reg. 2841 (1944) (restrictions on the delivery, acceptance, and use of milk sugar).

by the Government at the time the need for huge quantities of milk and other dairy products became acute, with the resulting necessity of dividing the available supply so as to meet all reasonable demands. The War Food

Administration might have directed the Office of Price Administration to institute rationing[56] of milk and milk products at the consumer level. On the other hand, the course subsequently adopted, namely, the issuance of a War Food Order in the terms already described, would, it was thought, be an appropriate method of handling the situation. This has proved to be the case. In effect, each handler of milk has been told that he may deliver a total quantity of milk, milk by-products, and cream to his customers; and, thus, it has been left to the individual handler to determine who shall receive his supply of milk. At the same time, the consumer has been left free to obtain as much milk and milk products as he can induce handlers to sell to him, consistent with the obligations of the handlers under the order.

[56] Rationing activities are carried on by the Office of Price Administration. Its original authority with respect to the rationing of food stems from War Production Board Directive 1 issued January 24, 1942, 7 Fed. Reg. 562, as supplemented. Exec. Order 9280, paragraph 4, December 5, 1942, 7 Fed. Reg. 10179, provides for the issuance of directives by the Secretary of Agriculture (succeeded, in this respect, by the War Food Administrator) with respect to rationing. Since the issuance of that order, a number of directives have been issued by the Administrator to the Office of Price Administration. See Food Directives 1 and 3-9, 8 Fed. Reg. 827, 3469, 2005, 2530, 2251, 3469, 3471, 7093, and 9600 (1943).

V. Marketing Programs with Respect to Commodities Other Than Milk

The Agricultural Marketing Agreement Act of 1937 does not, with respect to orders relating to commodities other than milk and its products, provide for the fixing of prices which must be paid to producers. With regard to fruits and vegetables, the statutory objectives are attained by the making of marketing agreements or the issuance of orders limiting or allotting, or providing methods for the limiting or allotting, of the total quantity of any of the specified commodities or products (or of any grade, size, or quality thereof) which may be marketed in interstate or foreign commerce. For example, the Act[57] authorizes, inter alia, the inclusion, in orders applicable to fruits, of provisions regulating the quantity which may be marketed by all handlers during any period, and the quantity which each handler may market during any period based upon the quantity which the handler has available for current shipment or, in the discretion of the War Food Administrator, upon the quantity shipped by the handler during a prior representative period.

[57] Section 8c(6) of the Act, 7 U. S. C. § 608c(6)(1940).

Historical considerations make clear the principle under which such orders operate. When remunerative markets for farm produce became limited, producers' cooperative marketing agencies were established which tried, by various means, to limit the amounts of produce moving to market. One of the fundamental difficulties of voluntary action by cooperative associations was that non-participating individuals derived the benefits of such operations without bearing any of the burden.

It became clear that benefits and costs had to be prorated equitably among all growers and handlers in the industry by making participation in a marketing program compulsory, if a stated majority desired to engage in such action and if such compulsion were necessary to the welfare of the industry. Orders under the Act which deal with fruits and vegetables supply this requisite element of compulsion.

Fruit and vegetable marketing orders, as in the case of milk marketing orders, are issued only after notice and opportunity for hearing upon a proposed marketing agreement and order have been given to all interested parties. Such orders must also be based upon findings. If the requisite number of handlers refuse or fail to approve of the proposed marketing agreement, and the War Food Administrator finds, with the approval of the President, that the failure of the handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act; that the issuance of an order is the only practical means of advancing the interests of producers; and that the order meets with the approval of the requisite number of producers, he may issue the marketing order. Marketing agreements may also be entered into under the terms of Section 8b of the Act.

The Circuit Court of Appeals for the Ninth Circuit recently described an important fruit marketing order in the following words:58/

58/ La Verne Co-operative Citrus Association, et al. v. United States, 143 F. (2d) 415, 417 (C. C. A. 9th, 1944).

> "Order No. 53, an 'Order Regulating the Handling of Lemons Grown in the States of California and Arizona,' was issued by the Secretary of Agriculture on April 5, 1941, and became effective on April 10, 1941. A public hearing, notice of which was given to appellants and to other interested persons, had been held, and the order was based upon evidence introduced at the hearing. The order regulates the handling of all lemons grown in California and Arizona and in the current of commerce between California, or Arizona, and any point in the United States or Canada outside the state. It establishes a Lemon Administrative Committee, which is charged with administering the order. It empowers the Secretary of Agriculture, upon the recommendation of the Committee, to fix the total quantity of lemons which may be handled during a specified week and to determine bi-weekly a prorate base for each handler who has applied to the Committee therefor. The prorate base is defined as the ratio between the quantity of each handler's lemons which are available for current shipment and the quantity of all handlers' lemons available for current shipment. The formula for determining each handler's weekly allotment is given as the product of the handler's prorate base and the total quantity of lemons fixed by the Secretary for handling during the week. The order indicates the basis upon which the quantity of lemons of a handler available for current shipment should be computed and includes provisions for variations in allotments under certain conditions."

Since the outbreak of the present war, War Food Orders issued under Title III of the Second War Powers Act, 1942,59/ have been issued, in some instances, to regulate the handling of fruits and vegetables

59/ 56 Stat. 176 (1942), 50 U. S. C. App. § 633 (Supp. 1943).

formerly subject to similar regulations under the Agricultural Marketing Agreement Act of 1937 and orders issued under it. However, it is important to remember that, while the technique of the regulation imposed in the War Food Order is, in some respects, the same as that used in marketing orders on the same subject, both the statutory authority and the rationale of the two types of orders are different. Allocation orders issued pursuant to the war powers are predicated upon a shortage, or a threatened shortage, in terms of total military, civilian, and other demands. On the other hand, the objective of orders issued under the Agricultural Marketing Agreement Act of 1937, as has already been stated, is to establish and maintain a designated level of remunerative returns to farmers.

An illustrative situation involving a fruit marketing order issued under the Agricultural Marketing Agreement Act of 1937 and a War Food Order issued pursuant to Title III of the Second War Powers Act, 1942, is found in the regulations relating to Georgia peaches. Formerly, there was a marketing agreement and order program, regulating the shipment of Georgia peaches, effective pursuant to the Agricultural Marketing Agreement Act of 1937, which imposed certain maturity requirements with regard to the shipment of peaches from Georgia, and which provided a method for limiting the grade and size of Georgia peaches which might be shipped in interstate commerce. Since it was estimated in June 1944 that the price for Georgia peaches would be substantially in excess of parity and that the operation of a marketing agreement and order program would not tend to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, such program was suspended.60/ However, in view of an estimated shipment of peaches

60/ Section 8c(16) of the Act, 7 U. S. C. § 608c(16)(1940), provides for the termination or suspension of marketing order and agreement programs.

from Georgia, during the 1944 season, below the average of shipments from that State, and in view of the prospective shortage in the supply of peaches produced in Georgia for defense and private account, it was necessary, in the public interest and to promote the national defense, to issue a War Food Order61/ regulating the shipment of peaches from that

61/ War Food Order 102, issued June 7, 1944, effective June 9, 1944, 9 Fed. Reg. 6205.

State. The order provides that no person shall ship peaches which fail to meet the requirements of U. S. No. 2 grade with respect to decay, maturity, and worms and worm holes, with certain tolerances and exceptions. Peaches shipped must also be inspected by an authorized representative of the Federal-State Inspection Service. Among other things, this latter regulation was issued to prevent the picking and shipping of immature and decayed peaches. Decayed peaches, mixed with sound peaches, tend to destroy the whole lot, and immature peaches are

frequently inedible and thus lost. Both of these conditions, if permitted to exist, would further aggravate the shortage of Georgia peaches. It is thus apparent that while the order issued under the Agricultural Marketing Agreement Act and that issued under Title III of the Second War Powers Act, 1942, have a common technique, they are used to accomplish different purposes.

VI. Relation of Act to Wartime Price Control Program

By the time of the entrance of this country into the present war, programs under the Act were so wide-spread and thoroughly imbedded in our agricultural economy[62] that the Congress, in Section 3(d) of the Emergency Price Control Act of 1942, as amended,[63] by which it created

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62/ From the time of the passage of the Agricultural Adjustment Act in 1933 until its amendment in 1935, 100 licenses were issued. Of these, 66 licenses regulated the handling of milk in various marketing areas, and 34 regulated the handling of other commodities. During this period, 61 marketing agreements were made, 18 dealing with milk and 43 relating to other commodities. The first marketing order was issued October 11, 1935. Since that time, 69 Orders (29 dealing with milk and 40 relating to other commodities) have been issued; and 41 marketing agreements (7 relating to milk and 33 dealing with other commodities) have been made. As of October 25, 1944, there were 46 of these programs in effect, 25 regulating milk and 21 dealing with other commodities. Among the commodities regulated by these programs are milk, oranges, grapefruit, peas, cauliflower, onions, fresh prunes, tangerines, pears, plums, peaches, tomatoes, grapes, lemons, potatoes, walnuts, and hops. In the following cities milk marketing orders with marketing agreements are in effect: Ft. Wayne, Indiana; Duluth, Minnesota; and Superior, Wisconsin. In the following areas, marketing orders and marketing agreements with respect to commodities other than milk are in effect: California, Colorado, Utah, Oregon, Washington, Florida, Mississippi, Arizona, and Idaho. In the following cities, milk marketing orders have been issued upon the failure and refusal of the requisite percentage of handlers to sign a marketing order in similar terms: St. Louis, Missouri; Boston, Massachusetts; Dubuque, Iowa; Kansas City, Missouri; La Porte, Indiana; New York, New York; Toledo, Ohio; Lowell and Lawrence, Massachusetts; Omaha and Council Bluffs, Nebraska; Chicago, Illinois; New Orleans, Louisiana; Washington, D. C.; Louisville, Kentucky; Fall River, Massachusetts; Sioux City, Iowa; Philadelphia, Pennsylvania; Cincinnati, Ohio; St. Joseph County, Indiana; Wichita, Kansas; and Clinton, Iowa. In the following areas, orders with respect to commodities other than milk have been made effective upon the failure and refusal of the requisite percentage of handlers to sign a marketing agreement in similar terms: Oregon, California, Michigan, Wisconsin, Minnesota, North Dakota and Arizona. In Topeka, Kansas, there is a milk marketing agreement without an order in effect.

63/ Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. § 901 et seq. (Supp. 1943), as amended by the Economic Stabilization Act, approved October 2, 1942, 56 Stat. 765, 50 U. S. C. App. § 961 et seq. (Supp. 1943), and the Stabilization Extension Act of 1944, Pub. L. No. 383, 78th Cong., 2d Sess. (June 30, 1944).

the Office of Price Administration and vested in it broad powers relating to the setting of prices, provided that nothing contained in the Price Control Act should be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license or order theretofore or thereafter issued under the provisions of the Act.64/

64/ The objective of the Congress in the passage of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. § 901 et seq. (Supp. 1943), as amended, was, among other things, to stabilize the cost of living (see § 1(a) of the Emergency Price Control Act of 1942), by authorizing the fixing of maximum prices (see §§ 2(a) and 3 of the Emergency Price Control Act of 1942, as amended). The objective of marketing agreement and order programs under the Agricultural Marketing Agreement Act of 1937 is to establish and maintain such orderly marketing conditions for agricultural commodities as will provide a stipulated minimum return to farmers. The objectives of the Agricultural Marketing Agreement Act of 1937, as amended, are thus different from and broader than the purposes of the Congress in passing the price control legislation. Under the latter, maximum prices are fixed to avoid unwarranted rises in the cost of living; under the former, provision is made for minimum returns to producers by establishing uniform marketing conditions in each area based on the historical experiences of the particular area. In operation, the two statutes thus preserve, in a manner consistent with the wartime stabilization program, the benefits which accrue to producers under the marketing agreement and order programs. The situation is not unique. Compare the responsibilities of the Wage and Hour Division of the Department of Labor in prescribing minimum wages under the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U. S. C. § 201 et seq. (1940), with those of the War Labor Board in fixing maximum wages, Exec. Orders 9017, 7 Fed. Reg. 237 (1942), 9250, 7 Fed. Reg. 7870 (1942), and 9328, 8 Fed. Reg. 4681 (1943), and the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. § 1501 et seq. (Supp. 1943). See the discussion by the Assistant to the War Food Administrator in In re Bailey Farm Dairy Co., et al., 3 A. D. 715, 728 (1944).

By a Memorandum of Understanding between the Department of Agriculture and the Office of Price Administration, approved by the Director of Economic Stabilization, an interagency procedure was established for exchange of information by the two agencies with regard to their respective functions. Both producers and handlers of milk have been aided by subsidies. Producers, in addition to receiving the returns provided by marketing agreement and order programs established in accordance with the standards of the Agricultural Marketing Agreement Act, have been materially aided by direct subsidy payments based on abnormal feed costs and drought conditions. Milk handlers have been assured adequate returns for their endeavors by the fixing of appropriate wholesale and retail maximum price levels by the Office of Price Administration and, in some cases, by the payment of subsidies by the War Food Administration. The integration of operations under the Agricultural Market Agreement Act of 1937 with the over-all stabilization operations of the Government has enabled marketing agreement and order programs to be used with substantial effectiveness in the Nation's war food program.

VII. Judicial Consideration of the Act

The Act and regulatory orders have been before the courts in a number of proceedings. As is usual in the beginning of important regulatory statutes, the first attacks against the legislation and orders were directed to the constitutional validity of the program. The Supreme Court, in United States v. Rock Royal Co-operative, Inc.,[65] and H. P. Hood & Sons, Inc. v. United States,[66] sustained the Act as a constitutional exercise of Governmental power, and upheld the orders regulating the handling of milk in the New York Metropolitan Marketing Area and the Greater Boston Marketing Area. In the Wrightwood case,[67] the Court had occasion to consider the Act and the order regulating the handling of milk in the Chicago Marketing Area. In that case, a suit for an injunction to compel delinquent handlers to comply with the terms of the order, the defendants contended that their operations were not subject to regulation under the Act and order because their business was entirely intrastate. The Supreme Court rejected this contention and stated:

> ". . . We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.[68]

The Court also decided that Congress had exercised this power by the Act.

In Stark et al. v. Wickard,[69] decided February 28, 1944, the Supreme Court also considered the Act and the Boston milk order in deciding whether a producer who sells to handlers subject to the order has a legal cause of action to obtain a review of the order on the ground that certain of its provisions are unauthorized by the Act. The Boston milk order contains provisions under which the market administrator makes deductions from the funds coming into his hands to make payments to cooperative associations handling producers' milk within the Boston area. The Supreme Court, in the Rock Royal case, supra, had held that handlers had no standing to question the use of this fund for such payments to cooperatives because handlers had no financial interest in the fund or its use. In the Stark case, the Government

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65/ 307 U. S. 533 (1939).

66/ 307 U. S. 588 (1939).

67/ United States v. Wrightwood Dairy Company, 315 U. S. 110 (1942).

68/ Id. at 121.

69/ 321 U. S. 288 (1944).

contended that the producers had no standing to question the use of the fund in question for this purpose, since neither the Act nor the Boston milk order regulates the activities of producers but merely prescribes a minimum price which handlers must pay them for their milk. However, the Supreme Court rejected this contention and held that producers, under the facts in the case before it, did have standing to challenge such use of the fund. The ultimate question involved in this litigation has not yet been finally decided by the courts, that is, whether the provisions of the order authorizing such payments to qualified producer cooperative associations are authorized by the Act.

The Supreme Court has also had occasion to consider the Act in other cases.70/

70/ See United States v. Borden Company, 308 U. S. 188 (1939), and Parker v. Brown, 317 U. S. 341 (1943), where the Act and programs under it were incidentally involved in litigation.

The largest number of cases involving this Act and orders issued under it have been instituted by the Government under Section 8a(6) of the Act, which vests United States District Courts with jurisdiction to enforce, and to prevent and restrain any person from violating, any order, regulation, or agreement made or issued under the Act. In cases of this character, the Government usually seeks mandatory and prohibitory injunctions. For example, if a handler has failed, as required by the order, to file reports concerning his operations or to make payments into the producer-settlement fund, or to make payments to the market administrator or other administrative body with respect to his prorata share of the administrative expenses of administering the order,71/ the Government normally will ask the court to issue an injunction

71/ Section 10(b)(2), 7 U. S. C. § 610(b)(2) (1940), requires the inclusion, in each order issued under the Act, of a provision that each handler subject to the order shall pay to the agency established to administer the order his pro rata share of such expenses as are necessary for the maintenance of the agency to administer the order.

compelling the defendant-handler to perform all of these acts required by the order, and to prohibit him from operating in the future in violation of the order.72/

72/ United States v. Rock Royal co-operative, Inc., 307 U. S. 533 (1939) (failure to comply with any of the provisions of the order); H. P. Hood & Sons, Inc. v. United States, 307 U. S. 588 (1939) (failure to comply with any of the provisions of the order); United States v. Adler's Creamery, Inc., 107 F. (2d) 987, 110 F. (2d) 482 (C. C. A. 2d, 1939, 1940), cert. denied, 311 U. S. 657 (1940) (failure to make any of the payments required under the order), United States v. Brightwood Dairy Company, 315 U. S. 110 (1942) and 127 F. (2d) 907 (C. C. A. 7th, 1942)(failure to comply with any of the provisions of the order); United States v. Whiting Milk Company, 21 F. Supp. 321 (D. Mass. 1937), aff'd, 307 U. S. 588 (1939) (failure to make payments to the producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from producers for marketing services); United States v. Andrews, 26 F. Supp. 123 (D. Mass. 1939) (failure to make payments to producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from

producers for marketing services); United States v. Krechting, 26 F. Supp. 266 (S. D. Ohio 1939) (failure to comply with any of the provisions of the order); United States v. Wittenberg, 21 F. Supp. 713 (S. D. Tex. 1938), aff'd, 100 F. (2d) 520 (C. C. A. 5th, 1938) (to enforce compliance with the provisions of a fruit marketing order); United States et al. v. David Buttrick Company et al., 28 F. Supp. 897 (D. Mass. 1939) (failure to comply with any of the provisions of the order); and Chapman v. United States, 139 F. (2d) 327 (C. C. A. 8th, 1943) (failure to make payments to the producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from producers for marketing services).

Since, in cases of this character, the Government does not sue primarily for a money judgment but for an injunction, civil contempt proceedings have been instituted in some cases when defendants refused to comply with the terms of injunctions. In a case of this type,73/

73/There are a number of decisions involving contempt proceedings brought by the Government against one Parker: Green Valley Creamery, Inc. v. United States et al., 108 F. (2d) 342 (C. C. A. 1st, 1939); Parker v. United States et al., 126 F. (2d) 370 (C. C. A. 1st, 1942); Parker v. United States et al., 129 F. (2d) 374 (C. C. A. 1st, 1942); Parker v. United States et al., 135 F. (2d) 54 (C. C. A. 1st, 1943), cert. denied, 320 U. S. 737 (1943).

an injunction was issued by the United States District Court for the District of Massachusetts and affirmed by the Circuit Court of Appeals for the First Circuit, requiring defendant-handlers to comply with the terms of the Boston Milk Order. Thereafter, the treasurer and sole stockholder of one of the corporate defendants was fined for contempt because of his acts in preventing compliance with the terms of the court's injunction. After a long series of proceedings in the District Court for the District of Massachusetts, the Circuit Court of Appeals for the First Circuit and the Supreme Court of the United States, a compensatory find was imposed on this defendant and he was ordered committed to jail until such time as he paid the amount imposed. The fine was based upon the amount of money owed by the corporate defendant controlled by the contemnor, and amounted to over $40,000.

Since the Act and the orders do not regulate producers as such, handlers, who are subject to regulation, have at times entered into contractual arrangements in attempts to secure the status of a "producer" and thereby escape regulation. In Elm Spring Farm, Inc., et al. v. United States,74/the officers and stockholders of a corporation engaged

74/ 127 F. (2d) 920 (C. C. A. 1st, 1942). Cosgrove v. Wickard, 49 F. Supp. 232 (D. Mass. 1943), is a similar case.

in handling milk formed a cooperative association in furtherance of a scheme to show that they were producers. An exceedingly complicated series of contracts were made between the corporation and various producers of milk--the object of all these transactions being to make the cooperative the "producer". The Circuit Court of Appeals for the First Circuit refused to permit the corporate-handler to acquire the status of a producer by this device and thereby avoid making payments into the producer-settlement fund as required by the Boston order. The

court stated that "If Cooperative had had the straightforward purpose of becoming a producer of milk it would hardly have negotiated the rather weird series of agreements. . . ."[75] The court further stated that:

> "Cooperative might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. 'It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers.' Gray v. Powell, 1941, 314 U. S. 402, 414, 62 S. Ct. 326, 86 L. Ed.--."[76]

75/ 127 F. (2d) 920, 926 (C. C. A. 1st, 1942).
76/ Id. at 927.

In the recent La Verne case,[77] the United States Circuit Court of Appeals for the Ninth Circuit considered the question of whether a handler, in an enforcement proceeding under Section 8a(6), is precluded from introducing evidence to controvert the constitutionality of an order issued under the Act, insofar as the applicability of the order to the handler is concerned, where the handler had not first exhausted his administrative remedy and secured a judicial review as provided by Section 8c(15) of the Act. The court decided that "A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action." The court continued by saying that: "The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act."

77/ La Verne Co-Operative Citrus Association et al. v. United States, 143 F. (2d) 415 (C. C. A. 9th, 1944).

The principle followed by the court in the La Verne case, supra, has also been applied by other courts. In United States v. Ridgeland Creamery Company,[78] decided October 26, 1942, the United States

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78/ 47 F. Supp. 145 (W. D. Wis. 1942).

District Court for the Western District of Wisconsin held that where the defendant-handler did not challenge the market administrator's computations of amounts owed by the handler to the producer-settlement fund by petitioning, under Section 8c(15)(A) of the Act, for review of the market administrator's determinations; the Government was entitled to a court order directing the defendant-handler to pay the amount shown to be due. The court refused to permit the defendant to introduce evidence, in the proceeding under Section 8a(6) of the Act, to show that the computations as to the amount it owed were incorrect. It said:

"Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meet all requirements of due process, that remedy is exclusive, and this court has no jurisdiction to review the actions and determinations of the Market Administrator, except in proceedings under Section 8c(15)(B) of the Agricultural Marketing Agreement Act of 1937."79/

79/ Id. at 149.

Another large group of cases has arisen under Section 8c(15) of the Act. Section 8c(15)(A) provides that any handler subject to an order may file a written petition stating that any such order or any provisions of such order, or any obligation imposed in connection therewith, is not in accordance with the law. The handler must be given an opportunity for a hearing upon his petition and, after the hearing, the War Food Administrator must make a ruling, which is final if in accordance with the law. Section 8c(15)(B) of the Act vests the District Courts of the United States, for the district in which a handler is an inhabitant or has his principal place of business, with jurisdiction to review such rulings by the War Food Administrator. If the court decides that the ruling is not in accordance with law, it may remand the proceedings to the War Food Administrator with directions either (1) to make such rulings as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted under Section 8c(15) does not prevent the Government from obtaining relief pursuant to Section 8a(6). However, the criminal penalty provided by Section 8c(15) may not be imposed for such violations as occur between the time of the filing of the petition and the date of the War Food Administrator's ruling under Section 8c(15)(A), if the court, in the criminal proceeding, finds that the petition was filed and prosecuted by the defendant in good faith and not for delay.

The nature of judicial proceedings under Section 8c(15) of the Act has been made clear by courts in numerous decisions.80/ All of the

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80/ Vogt's Dairies, Inc. v. Wickard, 45 F. Supp. 94 (S. D. N. Y. 1942); Fairview Creamery, Inc. v. Wickard, 42 F. Supp. 757 (D. Me. 1942); New England Dairies, Inc. v. Wickard, 51 F. Supp. 444 (D. Vt. 1943); M. H. Renken Dairy Co. v. Wickard, 47 F. Supp. 212 (E. D. N. Y. 1942); New York State Guernsey Breeders' Co-op. v. Wickard, 141 F. (2d) 805 (C. C. A. 2d, 1944), cert. denied, 65 Sup. Ct. 58 (1944); Barron Coop. Creamery et al. v. Wickard, 140 F. (2d) 485 (C. C. A. 7th, 1944); Sauquoit Valley Farmers' Cooperative, Inc. v. Wickard, 45 F. Supp. 104 (N. D. N. Y. 1942); Waddington Milk Company v. Wickard, 140 F. (2d) 97 (C. C. A. 2d, 1944); Queensboro Farm Products v. Wickard, 47 F. Supp. 206 (E. D. N. Y. 1942), aff'd, 137 F. (2d) 969 (C. C. A. 2d, 1943); Crull v. Wickard, 137 F. (2d) 406 (C. C. A. 6th, 1943); Cosgrove v. Wickard, 49 F. Supp. 232 (D. Mass. 1943); Wallace v. Hudson-Duncan Co., 98 F. (2d) 985 (C. C. A. 9th, 1938); and Nawa Dairy Farms, Inc. v. Wickard, 56 F. Supp. 67 (E. D. Pa. 1944). Cf. New York State Guernsey Breeders' Co-op. v. Wallace, 28 F. Supp. 590 (N. D. N. Y. 1939).

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reasons which have impelled courts to support the doctrine of exhaustion of administrative remedies, the doctrine of primary jurisdiction, and the doctrine of administrative finality have been reiterated in decisions discussing the functions of the War Food Administrator and the courts under Section 8c(15). Thus, the court, in the La Verne case, supra, emphasized the fact that the subject matter of litigation under Section 8c(15)(A) calls for technical knowledge pertaining to complex marketing problems in connection with milk and fruits and vegetables, possessed by the War Food Administrator.81/

81/ "Technical details of the milk business are left to the Secretary and his aides." Mr. Justice Reed writing for the majority of the Court in Stark et al. v. Wickard, 321 U. S. 288, 310 (1944).

The courts have been equally clear in stating the scope of review of rulings of the War Food Administrator by the courts under Section 8c(15)(B). In numerous decisions,82/ it has been stated that the

82/ See cases cited supra note 80.

court is limited to determining whether the ruling of the War Food Administrator is in accordance with law. The courts have taken the position that the statute does not authorize a trial de novo but simply provides for a review of the War Food Administrator's ruling as made on the basis of the evidence before him. Moreover, it has been held that, if the War Food Administrator's findings of fact are supported by substantial evidence, they will not be disturbed by the court even though, upon a consideration of all evidence, the court itself might reach a different conclusion. In M. H. Renken Dairy Company v. Wickard,83/ the court said:

83/ 45 F. Supp. 332, 333,335 (E. D. N. Y. 1942).

> "This action is brought to review the ruling made by the Secretary of Agriculture upon a petition filed by the plaintiff pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 . . . .
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> "The plaintiff, as petitioner, in this case had a full and fair hearing on its petition. There was clear and substantial evidence in support of the Secretary's findings, and the court will not disturb the Secretary's findings or rulings, and substitute its judgment for that of the Secretary, an administrative official, even if upon an examination of all the evidence the court might have in the first instance reached a different conclusion, which in this case it would not. . . ."

Litigation has also involved Section 8c(14) of the Act, which authorizes the imposition of criminal sanctions against any handler subject to an order issued under the Act who violates any provision of the order. These penalties may not be imposed with respect to violations occurring between the date of the filing of a petition and the ruling by the War Food Administration under Section 8c(15)(A) of the Act, if the petition is filed and prosecuted by the defendant in good faith and not for delay.

Experience has proved this provision to be effective. It has usually been invoked in connection with the enforcement of fruit and vegetable marketing orders. With the opening of a shipping season in an area regulated by an order which prohibits the movement, in interstate commerce from the area, of a commodity, unless it meets certain grade and size regulations, enforcement crews have been dispatched to the locality. They have, upon learning of violations, filed criminal informations with local Federal courts. This action has generally tended to prevent those who would be inclined to ship the commodity of the unsanctioned grade and size from carrying on activities in violation of the order.

The statute has been involved, in proceedings instituted by persons seeking to enjoin enforcement of marketing orders. These suits have been filed under the general equity jurisdiction of Federal courts and not under any specific provisions of the Act. It has been held, for example, that, under some circumstances, producers of milk may not maintain such actions, while under different circumstances they may.84/

84/ Wallace v. Ganley, 95 F. (2d) 364 (App. D. C. 1938) and Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941 (D. Mass. 1939) (holding that producers, under the circumstances involved, could not maintain the action); Stark et al. v. Wickard, 321 U. S. 288 (1944) (holding that producers, under the circumstances involved, could maintain the action).

This statute has also been involved in antitrust prosecutions.85/

85/ United States v. Borden Company, 308 U. S. 188 (1939).

Violations of reporting provisions of orders issued under the Act have been the basis for prosecutions under Section 35(A) of the Criminal Code,86/ which prohibits the making of false reports concerning any matter within the jurisdiction of any department or agency of the United States.

86/ 35 Stat. 1095 (1909), as amended, 18 U. S. C. § 80 (1940).

Conduct of all this litigation has been attended with a notable degree of success due, largely, to the effective presentation to the courts of the philosophy imbedded in the statute and to the recognition, by the courts, of the validity of this philosophy as a legitimate basis for regulation in the economic realm.